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IN THE

Supreme Court of the United States

October Term, 1967

No. 756

CHESTER W. WEGER, *Petitioner,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Before the Court	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
How Federal Questions Are Presented	4
Reasons for Granting the Writ and Argument Amplifying Same	5
Conclusion	17

INDEX TO APPENDICES

Appendix A. Opinion of the Court of Appeals:	
Majority Opinion	1
Dissenting Opinion	29
Modification of Opinion	31
Appendix B. Memorandum Opinion and Judgment	32
Appendix C. Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 2, Crim. No. 3090	56
Appendix D. Constitutional Provisions and Statutes Involved	57

TABLE OF AUTHORITIES CITED

Cases — Page

Albertson v. Subversive Activities Control Board, 382 U.S. 70 6
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 11
Camara v. Municipal Court, 387 U.S. 523 11
Chapman v. California, 386 U.S. 18 7
City of Seattle v. Drew, 423 P. 2d 522 13
Cox v. Louisiana, 379 U.S. 536 ..... 13, 14
Cregler, In re, 56 Cal. 2d 308, 363 P. 2d 305 15
Escobedo v. Illinois, 378 U.S. 478 6
Fields v. Fairfield, 375 U.S. 248 15
Freedman v. Maryland, 380 U.S. 51 11
Garner v. Louisiana, 368 U.S. 157 15
Garrity v. State of New Jersey, 385 U.S. 493 7
Gideon v. Wainwright, 372 U.S. 335 12
Gilbert v. California, 388 U.S. 263 12
Griffin v. California, 380 U.S. 609 7
Griswold v. Connecticut, 381 U.S. 479 ..... 9, 11
Huddleston, In re, 229 Cal. App. 2d 618, 40 Cal. Rptr. 581 15
Lanzetta v. New Jersey, 306 U.S. 451 13
Malloy v. Hogan, 378 U.S. 1 6
McFarland v. American Sugar Refining Co., 241 U.S. 79 16
Miranda v. Arizona, 384 U.S. 436 ..... 6, 7, 8, 9, 12
Morrison v. California, 291 U.S. 82 16
People v. Bruno, 211 Cal. App. 2d Supp. 855 8

Page

People v. Ridley, 63 Cal. 2d 671 9
Peters v. New York, No. 74 5
Russell v. United States, 306 F. 2d 402 6
Sibron v. New York, No. 63 5
Speiser v. Randall, 357 U.S. 513 .....15, 16, 17
Spevack v. Klein, 385 U.S. 511 7
Territory of Hawaii v. Anduha, 48 F. 2d 171 15
Terry v. Ohio, No. 67 5
Thompson v. Louisville, 362 U.S. 199 15
Time, Inc. v. Hill, 385 U.S. 374 16
Tot v. United States, 319 U.S. 463 16
United States v. Cardiff, 344 U.S. 174 13
United States v. Margeson, 259 F. Supp. 256 13
United States v. Wade, 388 U.S. 218 12
Wainwright v. City of New Orleans, No. 13 5

Miscellaneous

22 California Assembly Interim Report No. 1 (1961), p. 15 14

Rules

Rules of United States Supreme Court, Rule 22(1) .. 3

Statutes

California Penal Code, Sec. 647(e) .....
.....1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17
California Statutes of 1961, Chap. 560, p. 1672 4
United States Code, Title 28, Sec. 1257(3) 3
United States Code, Title 28, Sec. 2101(c) 3
United States Constitution, First Amendment ..4, 11

Page

United States Constitution, Third Amendment 3

United States Constitution, Fourth Amendment ..4, 5

United States Constitution, Fifth Amendment 4, 5, 6, 7, 8, 9

United States Constitution, Sixth Amendment 4, 11, 12

United States Constitution, Ninth Amendment 4

United States Constitution, Fourteenth Amendment 4, 12

Textbooks

14 University of California at Los Angeles Law Review (1966), pp. 59, 126-9 9

70 Yale Law Journal (1960), p. 1 5

IN THE

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PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

Petitioner Chester Weger prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second Appellate District, State of California, entered on June 5, 1967. Said judgment, one justice dissenting, held California Penal Code Section 647(e) to be constitutional and thereby reversed the holdings of the Appellate Department of the Superior Court and the Municipal Court of the Pasadena Judicial District, both of which courts held said section to be unconstitutional. California Penal Code Section 647(e) provides as follows:

> "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdeameanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

Opinions Below.

The Opinion of the Court of Appeal [C. T. 1][1] is reported in 251 A.C.A. 663. A copy of said Opinion is attached hereto as Appendix "A".

The Opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is unreported. A copy of the said Opinion [C. T. 10] is attached hereto as Appendix "B".

The Municipal Court of Los Angeles County, Pasadena Judicial District, rendered no written opinion. A copy of the Transcript Docket and the ruling of the Municipal Court are contained in the Clerk's Transcript [C. T. 4 and 5].

Jurisdiction.

1. The date of the judgment sought to be reviewed and the time of its entry is June 5, 1967 [Appx. A; C. T. 1]. In accordance with the custom of the appellate courts of California, the judgment of the court is contained in the last sentence of the Opinion (Appx. A, pp. 25 and 28).

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[1]The reference "C. T." is to the transcript of that portion of the record prepared and certified by the Clerk of the Court of Appeal, below. Said record contains, *inter alia,* portions of the record on appeal from the trial court and the record of the Court of Appeal of the State of California. The record was prepared without pagination and therefore the various documents therein have been identified by numbers "1" through "9" for convenience and are referred to accordingly. That portion of the record prepared and certified by the Clerk of the Appellate Department of the Superior Court consists of the Memorandum Opinion and Judgment and Order certifying case to Court of Appeal and are respectively identified by numbers C. T. "10" and "11". That portion of the record prepared and certified by the Clerk of the Municipal Court of the Pasadena Judicial District consists of the Demurrer and Points and Authorities and Defendant's Reply Brief to Opposition Brief of City Prosecutor, and are identified as numbers C. T. "12" and "13" respectively.

2. No rehearing was sought in the court below. A timely filed petition for hearing in the California Supreme Court was denied on July 26, 1967. A copy of the order of denial [C. T. 8] is attached hereto as Appendix "C". No extension of time was sought in this Court in which to petition for a writ of certiorari.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by a writ of certiorari are 28 U.S.C. 1257(3) and 2101(c) and Rule 22(1) of the Rules of this Court.

Question Before the Court.

Does Penal Code Section 647(e), quoted above at page 1, violate, on its face or as applied by the court below, the:

1. Right against self-incrimination as guaranteed by the Fifth Amendment and made applicable to the States by the Fourteenth Amendment to the Constitution;

2. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States because of vagueness and for the further reason that it places upon the citizen the burden of proving his innocence;

3. The right of privacy, including the right to silence, as guaranteed by the totality of the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution of the United States and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States

4. The right to counsel as guaranteed by the Sixth Amendment and made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth, Fifth Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States and the pertinent provisions of California Penal Code Section 647(e) (effective 1961, Cal. Stats. 1961, c. 560, p. 1672) are set forth in Appendix "D", attached hereto.

Statement of the Case.

There are no factual issues before the Court. The sole question is the constitutionality of California Penal Code Section 647(e).

How Federal Questions Are Presented.

The complaint was filed against petitioner in the Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California on June 13, 1966 [C. T. 3]. Thereafter, petitioner (then defendant) filed a demurrer to the complaint contending that the subject section denied to petitioner his right against self-incrimination, his right to be represented by counsel, and due process of law, all as guaranteed by the Constitutions of the United States and the State of California [C. T. 12]. In addition, petitioner (then defendant) filed in the Municipal Court proceedings a reply brief in opposition to the brief of the City Prosecutor opposing the demurrer. Therein, in addition to the constitutional grounds described in the demurrer, petitioner contended that 647(e) violated his basic constitutional right of privacy [C. T. 13]. The demurrer of petitioner was sustained by the judge of the Municipal Court, but no opinion was written [C. T. 4 and 5].

The opinion of the Appellate Department of the Superior Court held 647(e) to be unconstitutional as it violated the Fourth and Fifth Amendments to the Constitution of the United States (Appx. B). The opinion of the court below found the subject section to be constitutional and reached its decision solely by an examination of constitutional issues [C. T. 1 and Appx. A].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

1. This court has already indicated the constitutional gravity of the issues presented by California Penal Code Section 647(e) by the granting of certiorari in four cases which are presently pending before this Court this term, all of which present similar issues: *Peters v. New York,* No. 74, *Sibron v. New York,* No. 63, *Terry v. Ohio,* No. 67 and *Wainwright v. City of New Orleans,* No. 13. *Peters, Sibron* and *Terry* are concerned with the constitutionality of "stop and frisk" statutes. *Wainwright* is remarkably similar to the case at bar. 647(e), however, goes far beyond the aforementioned four cases in that the citizen must affirmatively "account for his presence" after he is detained initially or be convicted of a crime.

Moreover, the subject case is basically a vagrancy case. While 647(e) does not carry a vagrancy label (as does the arrest in *Wainwright*) it is nothing more than a sophisticated version of that very concept. When stripped of its niceties, 647(e) permits an arrest and conviction when the citizen is doing no wrong. See *Douglas, Vagrancy and Arrest on Suspicion,* 70 Yale L.J. 1 (1960).

The same reasons which persuaded this court to grant certiorari in the aforementioned four cases also justify this court's granting the petition here. Additionally, this case is even more egregious than any of the aforementioned four as it makes one a criminal for not affirmatively satisfying the police officer that his "presence" is "accounted for". For that and that alone, says 647(e), may he go to jail.

2. California Penal Code Section 647(e) violates the self-incrimination clause of the Fifth Amendment to the Constitution of the United States. The subject section compels the citizen to "account for his presence" and thereby make a substantive statement concerning his activities of a potentially incriminatory nature, or, in the alternative, be convicted of a crime. The crime for which he could be convicted is that of refusing to respond or, in effect, silence. Such a law violates the Fifth Amendment to the Constitution of the United States in that it results in compulsory self-incrimination. *Malloy v. Hogan,* 378 U.S. 1; *Miranda v. Arizona,* 384 U.S. 436; *Escobedo v. Illinois,* 378 U.S. 478.

This "dual bind" in which the citizen finds himself when faced with 647(e) is not a situation which is new to the Courts. See *Russell v. United States,* 306 F. 2d 402 (9th Cir.) and *Albertson v. Subversive Activities Control Board,* 382 U.S. 70. In both cases, the subject law compelled the citizen to perform an act which could result in self-incrimination; failure to comply resulted in conviction of a crime. In both cases, the balance was struck in favor of the constitutional right and the law held to be invalid. 647(e) places the individual in the *Albertson-Russell* type position of hav-

ing a 'choice between the rock and the whirlpool," does not give him a free choice to "admit, deny or refuse to answer" and is therefore unconstitutional (*Garrity v. State of New Jersey,* 385 U.S. 493).

This Court has held in *Griffin v. California,* 380 U.S. 609 and *Chapman v. California,* 386 U.S. 18 that comment upon a defendant's silence before a jury eroded the prohibition against self-incrimination and was therefore unconstitutional. *A fortiori,* that same silence cannot itself be made into a criminal act.

The concurring opinion in the court of appeal below holds that Fifth Amendment protection is not afforded the citizen unless he affirmatively invokes the amendment—that mere silence (which is the very thing the amendment protects) is not sufficient [Appx. A. p. 28 and C. T. 1, p. 36]. What this appears to mean is that a person who can incant the magic words is not a criminal, but that the citizen who goes to the very substance of the matter—namely, remaining silent—goes to jail. This serves only to penalize the ignorant and reward the worldly. While we cannot believe this to be the law, at a minimum, the manner in which the Fifth Amendment must be claimed by a citizen outside the courtroom is of sufficient magnitude that it warrants examination and consideration by this Court.

The subject section cannot be reconciled with the holdings of *Miranda v. Arizona,* cited *supra.* (See also *Spevack v. Klein,* 385. U.S. 511 and *Garrity v. New Jersey,* cited *supra.*) 647(e) requires the individual to provide the officer with identification and an explanation for his presence under certain circumstances. It is quite clear that the circumstances relate almost exclusively to the apprehension and punishment of criminals.

See *People v. Bruno,* 211 Cal. App. 2d Supp. 855. At the very moment the statute gives the law enforcement officer the right to compel the individual to account for his presence, the matrix of the situation would appear to include likelihood of commission of a crime and belief that the person being questioned is connected with that crime. The principles of *Miranda* would therefore require that the detainee be apprised of his constitutional rights, including the right to silence and to counsel. It would also appear that the *Miranda*-type warnings are mandatory as, by the very language of 647(e), the defendant must respond to the officer's inquiry and he is therefore in a state of "custodial interrogation". His freedom of action is significantly restrained in that he must answer the officer's questions at the specific location and moment when demand is made upon him. See *Miranda v. Arizona,* 384 U.S. at 478. The substance of the situation is to have the officer explain to the citizen his right to silence and counsel; should the citizen then assert these rights, he would be arrested by the very same officer for utilizing the constitutional guarantees just explained to him. *Miranda* is quite clear that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467. 647(e) does not "fully honor" these rights.

The opinion of the court concludes that silence is "not assertive conduct" in a 647(e)-type situation and is therefore not protected by the Fifth Amendment [Appx. A, pp. 19-21 and C. T. 1, pp. 25-27]. However, 647-(e) requires the individual to "identify himself and account for his presence," which seeks content. The fact that content itself is sought is evidenced by the very

definition relied upon by the court below [Appx. A, p. 11 and C.T. 1, p. 14], wherein it defines "account for" to mean: "to furnish substantial reasons or a convincing explanation; make clear or reveal basic causes." If this be so, it demonstrates that 647(e) is precisely aimed at the content of speech and is, in fact, unequivocally testimonial compulsion and is therefore within the realm of Fifth Amendment protection.

A second ground relied upon by the court in concluding that silence is not testimonial compulsion is that the officers making inquiry pursuant to 647(e) would not know *what* crime, if any, had been committed and therefore the questions would not be intended to elicit incriminating statements, but only to afford the defendant an opportunity to explain his presence and actions [Appx. A, pp. 21-24 and C. T. 1, pp. 27-30]. This type of compulsory opportunity or benefit has, it is submitted been rejected by this Court. *Miranda v. Arizona,* 384 U.S. at 482. See also: *People v. Ridley,* 63 Cal. 2d 671, and *What Is "Custodial Interrogation"?: California's Anticipatory Application of Miranda v. Arizona,* Graham, 14 U.C.L.A. L. Rev. 59, 126-9 (1966). Such reasoning results in the citizen being given an "opportunity" and then punished criminally if he fails to take advantage of that "opportunity".

3. California Penal Code Section 647(e) violates the basic constitutional right of privacy and protection from unreasonable intrusion into the activities and thoughts of the citizen by the State or its representatives. *Griswold v. Connecticut,* 381 U.S. 479. Section 647(e) denies this right to the individual in that it requires him to reveal to law enforcement officers a detailed description of his activities of the moment. This explana-

tion must be given by the individual though he be totally free of criminal involvement. Further, the section applies to *all* in that the words "loiters" and "wanders" as used in 647(e) have now, for the first time, been construed in an unrestricted manner so that they need no longer relate to criminal activity or involvement [Appx. A, p. 8 and C. T. 1, p. 11]. (This is further evidenced by the language of 647(e) itself, wherein it provides: "*Every* person . . ." [emphasis added]). Further, as now construed, 647(e) would require the California citizen to carry with him at all times and to display upon request, identification papers. The opinion of the court below appears to construe the word "identify" as requiring that the individual present written documentation of his identity to the law enforcement officer [Appx. A, p. 10 and C T. 1, pp. 13 and 14, wherein the word "identify" is defined by dictionary definitions to mean, *inter alia,* to "establish as being a particular person or thing; attest or prove to be as purported or asserted." "Proof that a person or thing is the person or thing [he or] it is supposed or represented to be."] The requirement that all citizens upon the street have with them at all times identification papers is foreign to this system of government and exists only in an aura of totalitarianism. It unconstitutionally invades the right of privacy of the individual.

This petition affords this Court an opportunity to decide an additional question upon which it has never ruled, but should. What is at issue is the effect of a statute which interferes with the constitutionally protected right of privacy and to be let alone. The opinion of the court of appeal below approaches the problem

of constitutionality of 647(e) with "a presumption in favor of constitutionality . . ." [Appx. A, pp. 2 and 3 and C. T. 1, p. 3]. This Court should determine whether the right of privacy is of sufficient constitutional import that the usual presumption in favor of constitutionality should not be applied, but instead, the rules applicable to First Amendment rights control, *i.e.*, where a First Amendment right is impinged, such a statute comes to the court "bearing a heavy presumption *against* its constitutional validity." *Freedman v. Maryland,* 380 U.S. 51, 57 (emphasis added) and *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58. See also: *Camara v. Municipal Court,* 387 U.S. 523 for a recent expression of this Court's concern for the right of privacy. It is submitted that the right of privacy is of no less magnitude than freedom of speech or political belief and should not be treated differently (*cf. Griswold v. Connecticut, supra*).

The subject section, as construed by the court below, changes our entire concept of the relationship between the state and the individual. Such an intrusion into the personal life of a citizen to this extent should not be permitted in the law at least without first being critically examined by this Court.

4. Penal Code Section 647(e) denies to the individual his right to counsel as guaranteed by the Sixth Amendment to the Constitution of the United States. The section requires the interrogated party to identify himself and to account for his presence "*when requested* by any peace officer" (emphasis added). This necessity for an immediate response obviously precludes the individual from having counsel present during the interrogation or, for that matter, even consult-

ing with counsel concerning the wisdom of responding to the officer's inquiry. A law preventing an individual from consulting with an attorney, particularly when he is suspected of criminal activity, violates the thrust of this Court's decisions in *Gideon v. Wainwright,* 372 U.S. 335, *Miranda v. Arizona, supra, United States v. Wade,* 388 U.S. 218, and *Gilbert v. California,* 388 U.S. 263.

647(e) presents an even more compelling case for the Sixth Amendment guarantee of the right to counsel than the cases just citied. In *Gideon, Gilbert* and *Wade,* evidence obtained without the benefit of counsel was excluded. In 647(e)-type cases, the defendant is guilty of a crime, *per se,* should he refuse to answer the officer's questions, even though his reason for refusing may be that he desires to first consult with counsel. The section is totally inconsistent with the dictates of the Sixth Amendment.

5. 647(e) violates the due process clause of the Fourteenth Amendment to the Constitution of the United States in that it is unconstitutionally vague.

The phrase "to identify himself" in the context of the statute at bar fails to meet the constitutional requirement of definiteness. What does a citizen have to do to satisfy this clause? Is it sufficient if he states his name, or must he also provide his residential address or perhaps even his place of employment? Is oral identification sufficient or must he also produce written document or identification papers (and may he be detained if, like many of us, such papers are not in his possession at the particular moment?) It is not the contention of petitioner that the word "identify" does not exist or that under certain circumstances it cannot be

definite for certain purposes. He does say that in this criminal statute—when *the* crime is failure to identify—the standard is not sufficiently specific to meet constitutional standards. Certainly the matter cannot be left to the determination of the police. *Cox v. Louisiana,* 379 U.S. 536, 579 (Opinion of Mr. Justice Black). If the individual must be convicted of the crime of failing to identify himself, he should at least be apprised of the specific information which must be presented. *United States v. Cardiff,* 344 U.S. 174 and *Lanzetta v. New Jersey,* 306 U.S. 451.

The unmodified words "to account for his presence" provide the citizen with no guidance as to the nature or extent of information which must be provided and are therefore unconstitutional. *United States v. Margeson,* 259 F. Supp. 256, 268-269 (Ed. Pa. 1966) (holding "good account" to be unconstitutionally vague). If the detainee says, "I'm taking a walk," or "I'm resting," has he accounted for his presence? If not, what more must he say in order not to be a criminal under this part of the statute? How far back in point of time must he relate his activities? Who is to judge as to whether he has "accounted" for his presence? Such a standard is unconstitutionally vague. *City of Seattle v. Drew,* .... Wash. 2d ...., 423 P. 2d 522 (1967). The questions raised by the construction to be placed upon the words in the section are not mere academic challenges, but as worded, 647(e) is truly an invitation to trouble. This is particularly true when it is realized that the type of individual who is most likely to be confronted by the demand of the law enforcement officer to account for his presence is one who is poor, from a minority group, or a non-conform-

ist. See 22 *California Assembly Interim Report No. 1,* page 15 (1961).

This final phrase of the statute at bar "if the surrounding circumstances are such as to indicate to a reasonable man that public safety demands such identification", provides the citizen with no guidance as to the fact situation which must exist before he is legally obligated to advise the officer of his identity and to account for his presence. The phrase does not require the *citizen* to know what the "surrounding circumstances" are so that he may guide himself away from criminal conduct by responding. The statute, although couched in terms of "a reasonable man," presumably controls how the officer must act, but, again, it leaves it to him to judge whether the citizen must respond. The citizen must know if the "surrounding circumstances" are such that the response is necessary if he is to escape criminal responsibility. Facts, however, may be known to the law enforcement officer, which would justify his inquiry, but he is under no duty to impart this information to the citizen. The citizen has only his visible surroundings before him and not the subjective information possessed by the officer. Such a law can only lead to the creation and not deterrence of criminals. Our government is one of "clearly defined laws," rather than government by the moment-to-moment opinions of a policeman on his beat. *Cox v. Lousiana,* cited *supra.*

The construction by the court below of the words "loiter" and "wander" is unconstitutionally vague. Previously, the California courts have upheld the constitutionality of the word "loiter" in criminal statutes by construing it narrowly so that it related to criminal

activity or intent. *In re Cregler,* 56 Cal. 2d 308; 363 P. 2d 305 and *In re Huddleston,* 229 Cal. App. 2d 618, 40 Cal. Rptr. 581. The opinion of the court below [Appx. A, p. 8 and C. T. 1, p. 11], has for the first time, construed the word "loiter" (and "wander") in such a manner that it bears no relationship whatsoever to criminal activity but applies to one who "linger(s) aimlessly or as if aimlessly in or about a place: . . . to move in a slow, idle manner; make purposeless stops in the course of a trip, journey, errand, etc." [Appx. A, p. 7 and C. T. 1, pp. 9 and 10]. As California now construes "loiter", it applies to every person in a public place. Such an interpretation now makes the mere walking upon the street an element of a crime. For that reason alone, the statute should be held invalid. *Territory of Hawaii v. Anduha,* 48 F. 2d 171 (C.G.A. 9, 1931). To hold otherwise would be to sanction the prosecution of wholly non-criminal conduct. See *Thompson v. Louisville,* 362 U.S. 199, *Garner v. Louisiana,* 368 U.S. 157, and *Fields v. Fairfield,* 375 U.S. 248.

Penal Code Section 647(e) is also violative of due process of law under *Speiser v. Randall,* 357 U.S. 513.

By the very terminology of the section, the circumstances are "suspicious". Whether the interrogation of the detainee has reached the accusatory stage or is still in the investigative phase, it cannot be gainsaid that both the statute and the police by interrogating under it place the burden upon the citizen of "clearing" himself. If he accepts the opportunity so presented, and the officers are satisfied, that is the end of the matter. (We leave aside consideration of the situation wherein the citizen's accounting is not satisfactory to

the police and he has incriminated himself as to another crime.) If, however, he does not accept the opportunity and is silent, *for not coming forward to overcome the suspicious circumstances*—for not shouldering the burden of proving innocent—the statute imposes criminal sanctions.

This is precisely the evil at which this Court struck in *Speiser*. There, a veteran who, or church which, would not sign a statement that he or it did not advocate the overthrow of the government by force or violence or other unlawful means nor advocated the support of a foreign government in the event of hostilities, was imposed with the sanction of loss of tax exemption. This Court held that this violated due process because it placed the burden of proof upon the citizen. The state had taken the position that the tax exemption was a privilege and that to obtain it the taxpayer had the burden of proving his entitlement. In striking down the requirement, this Court recognized that the statement was concerned with matters which could be criminal. It quoted (pp. 523-524) from criminal cases (*e.g., McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86; *Tot v. United States*, 319 U.S. 463, 469; *Morrison v. California*, 291 U.S. 82, 88) to the effect that the State cannot put on the defendant the burden of proving his innocence, and also from civil cases (at p. 524) which struck down statutes which unfairly shifted the burden of proof.

The statute at bar is subject to that precise disability. True, *Speiser* arose in a free speech context, while the present case arises in a right of privacy context. But the constitutional rights involved are not dissimilar. (*Cf. Time, Inc. v. Hill*, 385 U.S. 374). If, by

silence, the citizen does not come forward under the circumstances, set forth in 647(e) and clear himself, he is guilty of a crime. As *Speiser* demonstrates, the due process clause will not tolerate such a statute.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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